evidence of L.A. Chitty is to the effect that at the time of the sale the price of $1,105 was a fair price. It is probably correct that the sale could be set aside on the grounds mentioned in the judgment appealed from at the instance of a party interested, but this direction would be of little practical benefit to the estate, as admittedly the purchase price would have to be repaid and the estate would only be interested in the surplus, if any. As the argument proceeded on the basis that Raof had already been overpaid, he would not get the benefit of any accretion to the estate until Haji Ahmad, the other residuary legatee, had received payment of a sum equal to that received by Raof. And even supposing the unlikely event that after the shares of the residuary legatees had been equalised there was still a surplus divisible, I know of no principle of law under which the plaintiffs could claim immediate payment to them of the share payable to Raof without obtaining some order or direction in proceedings to which Raof was a party. The plaintiffs are only interested in a specific devise; they are strangers to the estate generally, and they cannot stand in Raof's shoes for the purpose of claiming any relief to which Raof may be entitled, but in respect of which they have at present no interest whatever.

As regards the alleged overpayment to Raof of $5,625 which, as I have said, is not referred to in the pleadings, it may have been open to Haji Ahmad to complain of this, but so far as the plaintiffs are concerned, any overpayments to Raof would have enured to their benefit as they would put him in a better position to repay the $10,000 charged on the Klebang land.

It is well established that if a specific bequest fails the legatee has no right of recoupment from the general estate. Even if Raof had wrongfully charged the land *after* Maimunah's death by taking advantage of the fact that the land was registered in his name, I cannot see that the executor would be liable for Raof's act which would have been beyond the executor's control, though no doubt an action would have lain against Raof. But the plaintiffs are in an even worse position in that the charge was made prior to Maimuah's death. The subject matter of the devise was therefore diminished by the amount of the charge, and it was only in effect an equity of redemption which passed to the plaintiffs. It is not suggested that the executor was under any duty to repay the $10,000 out of the general estate, and in the absence of any such duty the plaintiffs have no right of relief against the executor.

In my opinion, therefore, the plaintiffs never had any interest such as would entitle them to relief. The appeal will be allowed and the judgment in the Court below set aside and the action dismissed with costs. The appellants will be entitled to the costs of the appeal and the deposit should be repaid to them or their solicitors.

Poyser, C.J. (F.M.S.)—I concur.

Gordon-Smith, Ag. J.A.—I concur.

Appeal allowed.

Solicitors for appellants—*Zehnder Brothers.*

Solicitors for respondents—*Rogers & Son.*

[ORIGINAL CIVIL JURISDICTION]

PEDLOW, J.

August 29, 1940.

IN RE THE ESTATE OF MOHAMED SALLEH EUSOFF DECD.

AND

IN RE AN INDENTURE DATED THE 17th MAY 1915 ETC.

RAHIMABOO BINTE MOHAMED SALLEH ANGULLIA (f)

v.

MOHAMED AHMAD ANGULLIA & OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 5 of 1940]

Will—Mortgage of "all the share and interest" of a beneficiary—Construction—Beneficiary subsequently becoming entitled to a further share under a limitation to another's "heirs according to Mohammedan law" Spes successionis—Whether such interest passed under the mortgage—Mortgage executed by attorney—Construction of mortgage by reference to power of attorney —Effect of new referential document.

The testator M.S.E. Angullia died on the 21st September 1904 leaving a will and two codicils under which his two sons A. and E. and his daughter the plaintiff received certain shares. E's share was settled on certain trusts, the ultimate limitation, on failure of issue at E's death, being to "his heirs according to Mohammedan law." On the 31st January 1907, the plaintiff mortgaged to one Komarappa Chitty all her "share and interest in the estate and effects" of the testator, "and all other if any" her share and interest in the estates and effects of the testator "whether arising under the terms of his will or otherwise." The mortgage was executed by an attorney of the plaintiff.

At the date of the mortgage the plaintiff had her own share in the testator's estate and it was not disputed that this passed under the mortgage. E. died on the 7th June 1938 without issue, and thereupon his share in the testator's estate devolved upon his brother A, and his sister the plaintiff as his heirs according to Mohammedan law, in the proportion of 2 shares to 1 respectively.

The plaintiff's mortgage in the meantime had been foreclosed, and A. had taken a transfer of the mortgagee's rights and interest. A died on the 25th August 1939 leaving the 1st and 2nd defendants as his executors. The 1st and 2nd defendants claimed that A. as successor in title of Komarappa Chitty was entitled under the mortgage to the 1/3rd share of E's share in the testator's estate which devolved under the will to the plaintiff on E's death.

Held, that the interest of the plaintiff in E's share under the will was at the date of the mortgage a mere spes successionis and not an actual interest in property, and therefore did not pass under the description of the property assigned by the mortgage deed;

Held further, that the power of attorney under which the plaintiff's attorney executed the mortgage deed conferred no power to deal with a mere spes successionis and therefore an interest of this nature did not pass under the deed;

Held also, that an indenture dated the 17th May 1915 by which E. confirmed that the 1/3rd share should go to E's heirs according to Mohammedan law constituted a new referential document.

Cases referred to:—

(1) *Clarke, In re,* L.R. 36 Ch. Div. 348.
(2) *Fowler v. Buller,* L.R. 15 Ch. Div. 665.
(3) *Green, In re,* L.R. (1911) 2 Ch. Div. 275.
(4) *Parson, In re,* L.R. (1890) 45 Ch. Div. 51.
(5) *Sweetapple v. Harlock,* L.R. (1879) 11 Ch. 745.
(6) *Tailley v. Official Assignee,* L.R. 13 A.C. 523.
(7) *William's Settlement, In re,* L.R. (1911) 1 Ch. 441.

ORIGINATING SUMMONS.

C. H. Smith for plaintiff.

E. R. Koek for 1st and 2nd defendants.

I. Hoahing for 3rd and 4th defendants.

By his Will dated the 30th June 1898 Mohamed Salleh Eusoof Angullia bequeathed the residue of his estate among all his children in equal shares, sons taking twice as much as daughters. By a second codicil thereto dated the 8th January 1904, the testator settled the shares of his son Eusoof upon various trusts and subject to certain powers not material to the proceedings, and ultimately upon the death of Eusoof leaving no child who being a son should attain the age of 21 years or being a daughter should attain that age or marry, in trust for Eusoof's heirs according to Mohammedan Law, the shares of males being twice as much as the shares of females.

The testator died on the 12th September 1904, leaving 2 sons Ahmad and Eusoof, and two daughters Mominboo and the plaintiff. On the 31st January 1907 the plaintiff assigned by way of mortgage to one Komarappa Chitty all her "share and interest in the estate and effects" of the testator, "and all other if any" her share and interest in the estates and effects of the testator "whether arising under the terms of his Will or otherwise." This mortgage was executed by the plaintiff's husband Ebrahim bin Yacobjee under a power of Attorney from the plaintiff which gave him power to deal with the plaintiff's interest "whether vested or contingent, in possession or expectanct" in the testator's estate.

By various transactions subsequent to 1907, the plaintiff's equity of redemption under the mortgage was foreclosed and the mortgaged premises became ultimately vested in Ahmad free from such equity of redemption.

On the 17th May 1915 a deed was entered into between the trustees of the testator's will, Ahmad, Eusoof and two persons as Eusoof's trustees, whereby, *inter alia,* certain lands and premises were conveyed to Eusoof absolutely under certain powers in the Will and Codicil, in part satisfaction of Eusoof's share thereunder, and certain other lands and premises (being the lands and premises described in the Originating Summons) were severed from the Testator's estate, appropriated towards satisfaction of the balance of Eusoof's share, and vested in Eusoof's trustees upon the trusts declared by the Will and codicil concerning Eusoof's settled share.

On the 7th June 1938 Eusoof died without any child capable of taking his share the limitations in the Will and codicil and as his sister Mominboo had predeceased him, his only heirs according to Mohammedan Law were his brother Ahmad and his sister the plaintiff, their shares being 2/3rds and 1/3rd respectively. Ahmad died on the 25th August 1939 leaving the 1st and 2nd defendants as his executors. The 3rd and 4th defendants were at the date of the proceedings the separate trustees of Eusoof's settled share consisting of the lands and premises described in the Originating Summons.

The plaintiff claimed 1/3rd share of the lands and premises in question as one of the heirs according to Mohammedan Law of Eusoof, under the ultimate limitation of Eusoof's share in the testator's Will and codicil! The 1st and 2nd defendants opposed this claim on the ground that the plaintiff having assigned all her interest under the Will and codicil by the mortgage of the 31st January 1907, such interest (including the interest in Eusoof's share falling into possession at his death) vested in Ahmad as transferee of the mortgaged premises.

The plaintiff accordingly issued the Originating Summons to have the question determined as to who was entitled to the 1/3rd share of the lands and premises in question.

C. H. Smith for the plaintiff: The hope or expectation of succeeding to property as the heir or next-of-kin of a living person is not an interest in property, but a mere spes successionis *In re Parsons,*[4]; *In re Green,*[3]; and such an expectation did not pass as part of the property assigned in the mortgage deed. The operation of the mortgage deed is subject to the authority of the attorney executing it, and the power of attorney conferred no authority to deal with a mere spes successionis. The deed of the 15th May 1915 created a new referential document so that the plaintiff's title to the 1/3rd share therein may be said to arise under that deed, and not under the Will and codicil; and would not pass under an assignment made before the deed; *Sweetapple v. Harlock*[5].

E. R. Koek for the 1st and 2nd defendants: A spes successionis may not be a title to property within the meaning of e.g. the *Married Women's Property Act* as in *In re Parsons (Supra);* but it is an interest in the nature of property within the meaning of S. 2 of the *Conveyancing and Law of Property Ordinance;* and was always assignable in equity for valuable consideration; *Fowler v. Buller*[2]; *In re Clarke*[1], *Tailby v. Official Receiver*[6]. This is a case of a mortgage for valuable consideration and cases of voluntary settlements &c. must be distinguished. The property assigned must be presumed to be the best security the mortgagee could obtain, and the descriptions is wide enough to include an expectation such as this; see *Conveyancing and Law of Property Ordinance* Section 61; *In re William's Settlement*[7]. The description in the power of attorney is also wide enough to include a spes successionis; in any case, there is no evidence that the plaintiff did not receive the benefit of the mortgage. The plaintiff's title is under the Will and Codicil, not under the deed of 1915 which only effected a separation of the trusts of Eusoof's share from the rest of the estate.

Smith in reply.

Hoahing for the 3rd and 4th defendants took no part in the argument.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Pedlow, J.—This is a summons for the determination of the following question:—

> "Is the plaintiff as a sister and therefore one of the next of kin of Eusoof Mohamed Salleh Angullia, deceased, according to Mohammedan Law now entitled to (a) one-third share in the leasehold land and premises situate and known as Nos. 134 to 137 Queen Street, Nos. 25 to 31 Angullia Road and Nos. 10, 12, 14 and 16 Muar Road, Singapore?"

The facts of the case are *inter alia,* set out in the lengthy affidavits sworn on the 10th day of January, 1940 and the 19th day January, 1940 by the plaintiff and the first and second defendants respectively.

The first and second defendants are the executors and legal personal respresentatives of Ahmad Mohamed Salleh Angullia, a brother of the plaintiff and a son of Mohamed Salleh Eusoof Angullia, deceased. The latter is hereinafter referred to as "the testator." He died on the 21st day of September, 1904. Ahmad died on the 25th day of August, 1939. His brother Eusoof Mohamed Salleh Angullia died on the 7th day of June, 1938. The third and fourth defendants are the trustees of the share of Eusoof in the testator's estate. The third and fourth defendants are, therefore, bare trustees to distribute the estate according to the Court's decision and their attendances were dispensed with.

The first and second defendants base their case on a mortgage dated the 31st day of January 1907 and made between the plaintiff as mortgagor, Ebrahim bin Yacobjee Angullia, the husband and Attorney of the plaintiff (referred to in the mortgage as "the Surety"), and R.M.S.M. Komarappa Chitty and the subsequent transfer of that mortgage to Ahmad. The second paragraph of the mortgage is the important one. It reads as follows:—

> "2. The Mortgagor hereby assigns and the surety hereby confirms unto the Mortgagee ALL the share and interest of the Mortgagor in the estate and effects of the said Mohamed Salleh Eusoof Angullia and in the moveable and immoveable property subject to the terms of his Will and in the rents, profits and income thereof and in the proceeds of sale thereof. And all other if any the share and interest of the Mortgagor in the estates and effects of the said deceased and that whether arising under the terms of his Will or otherwise. TO HOLD the same unto the Mortgagee Provided if all sums of money due under the terms of the foregoing covenant shall at any time be paid under the terms of the foregoing covenant in that behalf the said share and interest and other the premises hereby assigned shall be reassigned to the Mortgagor at her request and cost and this security shall be discharged."

The question at issue is whether that paragraph mortgaged to the chetty the plaintiff's one-third share in Eusoof's share of the testator's estate to which the plaintiff became entitled on the 7th day of June, 1938, in the circumstances set out in paragraph 16 of the plaintiff's above-mentioned affidavit.

It seems to me that the question propounded in the Originating Summons must be answered in the affirmative for the following reasons:—

1. When the mortgage to Komarappa Chitty was executed in 1907 the interest which the plaintiff then had in the testator's estate in respect of Eusoff's share in that estate was in my view a mere spes successionis and not an interest vested or contingent in possession or expectancy. A spes successionis is not a title to property in English Law. See *in re Parsons L.R.*[4]; *in re Green L.R.*[3] and 27 *Hailsham* 751 which reads as follows:—

> "No one could have any estate or interest, at law or in equity, in the property of a living person by reason of the fact that he hoped to succeed as heir-at-law or next of kin; and it was the same where there was a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person; or where the limitation was not to the actual heir or next of kin at the death, but to the persons who would be heir or next of kin if the ancestor were to die at some future time. Such mere expectation, known as a spes successionis, conferred no actual interest in the property, not even a contingent interest, or an interest in expectancy, since **nemo est hoeres viventis**; and, as long as the ancestor was alive there was no person in whom the right to take by descent resided. And it is the same now as regards persons who may hope to benefit under the rules for the distribution of the residuary estate of an interest in S. 46 of the Administration of Estates Act, 1925. Hence spes successionis is not a title to property."

The mortgage was executed by the "Surety" as attorney of the plaintiff by virtue of a Power of Attorney dated 21.1.1908. The Attorney can only mortgage what his principal authorised him to mortgage and the Power of Attorney does not mention a spes successionis. It refers instead to the plaintiff's interest whether vested or contingent in possession or expectancy in the said estate. Neither does the mortgage itself mention a spes successionis. Therefore if it is correct that the plaintiff's interest, which has given rise to the present case, was a spes successionis as I have found, the plaintiff's interest is not mortgaged and did not pass to Ahmad and the plaintiff has not disposed of her one-third share.

It is a Cardinal Rule of construction of written instruments that the grammatical and ordinary sense of the words has to be adhered to unless that would lead to absurdity or repugnance or inconsistency with the rest of the instrument—Beal on Cardinal Rules of Interpretation, Third Edition, page 81, and the construction I am placing on the mortgage would appear to conform to that rule. There is a technical legal phrase which describes the nature of the plaintiff's interest which the first and second defendants now say passed by the mortgage but that phrase is not used in the mortgage nor in the Power of Attorney under which the mortgage was executed. Furthermore at the time of the execution of the mortgage the chance that the plaintiff would benefit by this spes successionis was a very remote one indeed especially as Eusoof being a Mohammedan could have more than one wife and so was unlikely in the ordinary course of nature to die childless. Again the value of the property actually mortgaged was, I am informed, very much in excess of the money secured and on the face of it there was no necessity to endeavour to make the mortgage all comprehensive in its terms.

2. What I have said so far is sufficient to dispose of this summons, but another point was taken by the plaintiff which I consider a sound one. The interest which Eusoff's next of kin takes seems to me to be under the document exhibited as "R5", an indenture dated the 17th day of May, 1915, (which in my opinion creates a new referential document) and not alone under the Second Codicil to the testator's will, and, if this is so, any prior purported disposition of the interest is not valid and the interest is not affected. This follows the decision in *Sweetaplle v. Horlock*[5]. Exhibit R5 sets out the whole matter in some detail and page 6 recites what Ahmad has acquired by purchase from the plaintiff, and the recital contains no reference to the plaintiff's possible interest in Eusoof's estate though it does refer to her interest in her mother's estate. As Ahmad is a signatory of that document it shows Ahmad's own view of the position at any rate until 1915, and that view is in accord with my present decision.

I make a declaration that the plaintiff is entitled to an equal one-third share, as claimed, in the property set out in the summons.

Judgment for Plaintiff.

[ORIGINAL CIVIL JURISDICTION]
McELWAINE, C.J.
September 2, 1940.

RE MOHAN SINGH
Exparte THE OFFICIAL ASSIGNEE.

[SINGAPORE BANKRUPTCY No. 391 of 1938]

Bankruptcy Ordinance—S. 89 s.s. 1—Jurisdiction of the Bankruptcy Court over a common money demand against a stranger to the bankruptcy.